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**PUBLIC PROTECTORS REVIEW DECISION ON AN INTERNAL
REVIEW IN TERMS OF RULE 44(1) OF THE RULES RELATING TO
INVESTIGATIONS BY THE PUBLIC PROTECTOR AND MATTERS
INCIDENTAL THERETO, 2018: MR M SIKWEZA**

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1. INTRODUCTION

1.1 This is a Notice of the Public Protector's decision on an internal review by Mr Melisizwe Sikweza (the Complainant), in terms of Rulle 44(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended and promulgated under section 7(11) of the Public Protector Act (the Rules).

2. THE COMPLAINT

2.1 The complainant approached the Cape Town Provincial Office of the Public Protector on 13 April 2012. After the file was registered, it was transferred to the Bisho Provincial Office since it appeared to involve an Eastern Cape Provincial Government Department.

2.2 The Public Protector was approached against the background of the Complainant's dismissal from his employment with the Eastern Cape Department of Health (ECDoH) during 2005, after he was found guilty of misconduct.

2.3 The following information was provided by the Complainant when he approached the Public Protector:

2.3.1 A disciplinary enquiry took place in his absence, and he was dismissed from work during 15 November 2005. An appeal was made to the then MEC, Dr Bevan Goqwana (Dr Goqwana), who upheld his dismissal. He subsequently referred the matter to the Public Health and Welfare Sectoral Bargaining Council (PHWSBC);

2.3.2 The process of arbitration continued, and he solicited the services of Mr Makade an attorney from Mthatha. He lost the arbitration, and he approached Mr Makhanya, an Attorney from East London, who agreed to assist him *pro bono* and to his dismay Mr Makhanya dragged his case and fed him lies for more than three

(03) years until he decided to approach the Labour Court in Port Elizabeth (now Gqeberha), in 2007;

2.3.3 The case number was P371/06 (which upon further inquiry with the said Labour Court appears to be the incorrect case number);

2.3.4 In February 2011, Mr Makhanya advised him to approach Legal Aid South Africa (LASA) for help in relation to the transcription of the tapes, which he did. It took Adv Masizana, who is employed with LASA, more than three (03) months to secure a copy of his file from Mr Makhanya. Without any delay, the LASA initiated the process and a recommendation to pay for the transcription of the tapes was made by Adv Masizana to his principal for approval;

2.3.5 Adv Masizana needed a copy of Circular No. 8 of 2003, which was used by the Department of Health to find him guilty of the charges against him for the application to be successful. He reverted to Mr Makhanya for help with the circular who promised to dispatch it to Adv Masizana, with no success. He attempted to approach the National Treasury and the Department of Health to secure the circular and was told that it does not exist; and

2.3.6 He then requested assistance from the Office of the Public Protector in obtaining Treasury Circular No. 8 of 2003, as it was one of the requirements that LASA had to furnish to the Board, in order for the payment of twelve thousand seven hundred rand (R12 700) for the transcription of the tapes, to be approved.

3. CONDONATION

3.1 In terms of Rule 44(2) of the Rules, a request for an internal review of a decision must be made in writing on a form that is available from any of the offices of the Public Protector South Africa, within ninety (90) days of being informed of the decision.

- 3.2 The relief sought from the Public Protector was assistance to obtain a copy of Treasury Circular 8 of 2003.
- 3.3 The complaint was then closed by way of a Closing Report. In the Closing Report reference was made to section 6(6) of the Public Protector Act, which provides that *“nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law”*.
- 3.4 It was further indicated that in terms of Rule 11(1)(b)(vii) of the Rules, the Public Protector *shall refuse to investigate a complaint in terms of section 6(3) of the Act, where a court of law or similar dispute resolution forum has already adjudicated the complaint, the issues raised therein or the relief sought by the complainant.”*
- 3.5 The signed Closing Report, which was submitted to the Complainant could not be located, along with the contents of the office file, despite a diligent search to locate it. As a result, the date of the signed Closing Report is also not known.
- 3.6 It is also not clear whether the Complainant lodged a request for an internal review in terms of Rule 44(2) of the Rules, however, the Complainant was not satisfied with the progress of the investigation, and he complained to the Public Protector Head Office. In 2016, Mr Reginald Ndou (Mr Ndou), a former employee, who was responsible for Provincial Integrated Investigations (PII) at the time, forwarded an email to the Complainant advising him that the office has no jurisdiction to investigate his complaint since his dismissal was upheld by a statutory Labour Council during arbitration.
- 3.7 Since then, the Complainant indicated that the assistance he requested was not rendered and he is currently still engaging with the office of the Public Protector.
- 3.8 Considering the facts stated above, the Public Protector resolved to treat the Complainant’s grievance about the manner in which the matter was dealt with,

as an internal review, and to condone any deviation from the Rules as far as the prescribed timeframes are concerned.

4. GROUNDS FOR REVIEW

4.1 The Complainant submitted that the Public Protector is required to assist him in obtaining a copy of Treasury Circular 8 of 2003, as per his complaint lodged on 13 April 2012.

4.2 He further stated that as a result of the Public Protector's alleged failure to properly attend to or deal with his initial complaint/request lodged in 2012, he is prejudiced to the extent that he could not pursue or fully utilise the legal remedies at his disposal to challenge his dismissal. He is under the impression that the Public Protector should under such circumstances carry some form (possibly financial), liability.

5. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

5.1 The Public Protector is an independent constitutional institution, established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

5.2 Section 182(1) of the Constitution provides that:

“The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or

suspected to be improper or to result in any impropriety or prejudice;

- (b) to report on that conduct; and*
- (c) take appropriate remedial action”.*

5.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states amongst others that, the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

5.4 Section 7(1) of the Public Protector Act, 23 of 1994 (Public Protector Act), confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation.

5.5 The Public Protector may refuse to investigate a matter reported to him or her by a public servant or person prejudiced by maladministration or other forms of misconduct by the State as listed in sections 6(4) and (5) of the Public Protector Act where the person has not taken all reasonable steps to exhaust the remedies conferred upon him or her.

5.6 In terms of section 6(9) of the Public Protector Act a complaint or matter referred to the Public Protector after two (02) years from the occurrence of the incident or matter concerned, shall not be entertained unless the Public Protector finds special circumstances to permit the investigation.

6. HOW THE PUBLIC PROTECTOR DEALT WITH THE REQUEST/ COMPLAINT

6.1 The matter was assigned to a former employee, Ms Siphokazi Jika (Ms Jika) for investigation. Upon the receipt of the complaint, the Investigator at the Bisho Provincial Office of the Public Protector conducted a preliminary investigation in terms of section 7(1) of the Public Protector Act and Rules 20 and 21 of the

Rules, by making an enquiry at the ECDoH. At the time, the Department could not trace the file of the Complainant.

- 6.2 The Public Protector has since 2015, been unsuccessfully requesting the Head of the Department of Health to provide the records on the process followed in handling the Complainant's matter, as well as his Personnel File containing the records of the Department's disciplinary processes against him, and his ultimate dismissal and any other document which has a bearing in the investigation into the matter.
- 6.3 On 15 March 2016, Mr Quintin van der Merwe, the then Deputy Director: Employment Relations at the ECDoH sent an email to Ms Jika, indicating the following:
 - 6.3.1 ECDoH initiated disciplinary action against the Complainant on 2 and 3 June 2005, wherein the Complainant was charged for misconduct which, *inter alia*, emanated from charges in connection with contravening the Provincial Treasury Circular 8 of 2003, in that he failed to comply with procurement procedures in the purchasing of Customer Care Service Training and Human Resources Services at Rietvlei Hospital in September 2004;
 - 6.3.2 The Complainant was found guilty on charges relating to the unauthorised use of a departmental vehicle, non-compliance with procurement processes and gross insubordination;
 - 6.3.3 The Complainant was dismissed by the ECDoH on 15 November 2005;
 - 6.3.4 The Complainant lodged an appeal against the conviction and sanction to the Member of the Executive Council (MEC) at the time, however, his appeal was unsuccessful, and his dismissal was confirmed;

- 6.3.5 The Complainant subsequently referred the matter to the Public Health and Welfare Sectoral Bargaining Council. In terms of the arbitration award issued on 19 June 2007, he was found guilty on all charges, except the charge of insubordination that was withdrawn;
- 6.3.6 The Arbitrator further ruled that the decision to dismiss the Complainant was both procedurally and substantively fair;
- 6.3.7 In 2007, the Complainant brought an application to the Labour Court in Port Elizabeth to have the arbitration award set aside. The application was subsequently abandoned as his attorney failed to obtain certain documents relevant to the court application; and
- 6.3.8 He would draft a formal response to the allegations letter sent to the ECDoH and submit it to the Superintendent General for signature before sending same to Ms Jika.
- 6.4 The complaint was then closed by way of a Closing Report. In the Closing Report reference was made to section 6(6) of the Public Protector Act which provides that *“nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law”*.
- 6.5 It was further indicated to the Complainant, that in terms of Rule 11(1)(b)(vii) of the Rules, the Public Protector *shall refuse to investigate a complaint in terms of section 6(3) of the Act, where a court of law or similar dispute resolution forum has already adjudicated the complaint, the issues raised therein or the relief sought by the complainant”*.

- 6.6 The signed Closing Report, which was submitted to the Complainant could not be located, along with the contents of the Public Protector's office file, despite a diligent search to locate it. As a result, the date of the signed Closing Report is also not known.
- 6.7 The Complainant was not satisfied with the progress of the investigation, and he complained to the Public Protector Head Office. In 2016, Mr Reginald Ndou (Mr Ndou), a former employee, who was responsible for Provincial Integrated Investigations (PII) at the time, forwarded an email to the Complainant advising him that the office has no jurisdiction to investigate his complaint since his dismissal was upheld by a statutory Labour Council during arbitration.
- 6.8 The complaint was subsequently considered by the late Adv C H Fourie (Adv Fourie), who was the Acting Provincial Representative of the Eastern Cape during October 2018, and he addressed a communication to the Complainant, dated 22 October 2018. In the said communication, Adv Fourie, *inter alia*, confirmed that he has considered the complaint and the information obtained during the preliminary enquiries which were made after the Complainant had lodged his complaint and he confirmed that the Public Protector does not have powers to review and set aside an award which was made by the Arbiter, in terms of the Labour Relations Act, 1995. Adv Fourie indicated that the remedy at the time was to take the matter to the Labour Court, which the Complainant did, but failed to pursue.
- 6.9 The Eastern Cape Provincial Representative: Mr VX Dlamini (Mr Dlamini) engaged with the Complainant during October 2020 and perused the documents relating to the complaint. After going through the relevant documents, Mr Dlamini was also persuaded by the position taken by Mr Ndou and advised the Complainant that indeed, the office did not have jurisdiction to investigate the

complaint since it was decided by a statutory body, which derives its powers from sections 52 and 127 of the Labour Relations Act 66 of 1995 (as amended).

- 6.10 The Complainant was also advised by Mr Dlamini in October 2020 to take the decision of the council to the Labour Court if he was not satisfied with the outcome, as the Public Protector could not lawfully vary, override or pronounce on such dismissal as it had been decided upon by a competent Labour Council.
- 6.11 In 2020, the Complainant forwarded another email to the Public Protector requesting a meeting with the Public Protector as he was not happy with Mr Ndou's correspondence indicating that the Public Protector had no jurisdiction to investigate his complaint.
- 6.12 The Complainant maintained that he was not provided with the needed service, which was to assist him in obtaining a copy of Treasury Circular 8 of 2003.

The Complainant's affidavit, dated 13 April 2012

- 6.13 On 13 April 2012, the Complainant deposed to an Affidavit in support of his complaint lodged with the Public Protector.
- 6.13.1 Regarding circular 8 of 2003, the Complainant stated as follows:
"I once again reverted to Mr Makhanya for help with the said circular (Circular No.8 of 2003). Promises were made by Mr Makhanya, to dispatch a copy to Adv Masizana, with no success. I then tried in vain to approach various personnel from both the Dept of Treasury, and the Department of Health to secure the circular, with no success only to be told that a circular of that nature does not exist within the department as it never existed".

Analysis

- 6.14 Generally, when a matter is subjected to an internal review, the Reviewer would seek to determine whether or not-
- a) The matter and/ or investigation was dealt with in accordance with the relevant Public Protector South Africa (PPSA) prescripts and procedures;
 - b) The outcome or decision was reasonably connected to the evidence or information at the disposal of the Public Protector; and
 - c) The decision was properly communicated to the complaint(s).
- 6.15 On the first issue, it was established that the matter was allocated or dealt with by several investigators and Managers, who proceeded to conduct at least a preliminary investigation into the circumstances surrounding the Complainant's dismissal. After it was established that the complainant had already challenged his dismissal at the level of the Public Health and Welfare Sectoral Bargaining Council, that an arbitration award had been issued, and that the matter was to be pursued or being pursued in the Labour Court, it was concluded that the Public Protector lacked the necessary competence to proceed with a full scale investigation into presumably a complaint related to the complainant's dismissal.
- 6.16 Closer scrutiny, however, reveals that the correspondence to the Public Protector was misconstrued as a complaint about the Complainant's dismissal, while he was in fact (only) seeking assistance to access or obtain a copy of Treasury Circular 8 of 2003. The substantive issues pertaining to his dismissal as well as the fairness thereof, were not the subject of the approach to the Public Protector.
- 6.16.1 In hindsight it is an open question whether the Complainant reported a "complaint" related to improper conduct, or wrongdoing or prejudice as envisaged in section

182 of the Constitution and section 6 of the Public Protector Act, which would have prompted the Public Protector to consider an investigation.

6.16.2 In any event, there is no record that the investigation would have been sanctioned by the provisions of section 6(9) of the Public Protector Act since the incident concerned (the Complainant's dismissal) occurred at least seven (7) to eight (8) years prior to his approach to the Public Protector and there is no indication that special circumstances were established when the matter was entertained.

6.16.3 As a request for assistance which did not strictly fall within the Public Protector's areas of responsibilities, an appropriate response would have been to advise the Complainant on the course of action that would have been open to him to seek or secure access to the Circular which he was seeking.

6.17 Keeping in mind that the Complainant was legally represented and/or did have access to the services of three legal representatives, and that the Circular was apparently available in the public domain, it did not fall within the primary responsibility of the Public Protector to provide the Complainant with the Circular in question and he should have been advised accordingly.

6.18 The Complainant did not indicate in his affidavit whether he sought any assistance at the Labour Court when he proceeded to lodge his appeal there in 2007, to establish what he could do to ensure that a record of the proceedings is lodged with the Court.

6.19 The Complainant further does not state in his affidavit what he or Adv Masizana did after 2007 obtain a copy of Treasury Circular 8 of 2003.

6.20 The initiative by the Investigating Team to embark on a preliminary investigation was a *bona fide* attempt to assist the Complainant, even though that was not the reason why he approached the Public Protector. The Public Protector was in any

event, barred from proceeding with an investigation due to the fact that the matter was reported outside the time limitation of two (02) years as prescribed in section 6(9) of the Public Protector Act, as well as the fact that the complainant had not exhausted the legal remedies at his disposal.

- 6.21 The Complainant lodged a complaint with the office of the Public Protector on 13 April 2012. At the time the Complainant lodged his complaint with the Public Protector, the time that has lapsed for him to further pursue his appeal in the Labour Court was already excessive (approximately five [05] years after the appeal was lodged with the Labour Court).

7. OUTCOME OF THE REVIEW APPLICATION

- 7.1 Based on the analysis of the information available in its entirety, against the Complainant's reasons for requesting an internal review, it is the Public Protector's considered view that the request for internal review of the closure of the matter cannot succeed.
- 7.2 The Investigator(s) involved in the matter took the initiative to embark on a preliminary investigation into the substantive issues pertaining to the Complainant's dismissal and correctly concluded that the Public Protector could not embark on a full scale investigation for the reasons canvassed above, including a lack of jurisdiction and competency to deal with the matter, because it was reported to the Public Protector well outside the prescribed time limitation of two (02) years after the incurrance of the incident in 2005;
- 7.3 If the criteria for reviewing a decision of this kind, as outlined above, are applied, then the decision stands firm on both procedural grounds and reasonableness. Additionally, the decision has been communicated and explained to the complainant multiple times;

- 7.4 The standard operating procedure of the PPSA directs those matters reported to the Public Protector, are first assessed to determine if the information provided, constitutes a proper complaint and *prima facie* allegations and evidence of improper conduct, to set in motion the Public Protector's powers in terms of the Constitution and the Public Protector Act. In terms of section 7(1) of the Public Protector Act, it is within the prerogative of the Public Protector to decide if and how such a matter should be dealt with.
- 7.5 In the matter at hand, it appears that the assessment process swayed in the direction of focusing on the conduct with which the Complainant was clearly aggrieved with, namely the circumstances of his dismissal. In the process, however, it appears that the actual reason for the Complainant's approach to the Public Protector, namely, to seek assistance to obtain a copy of Circular No. 8 of 2003, was not dealt with. In the absence of the file, the reasons for this approach are not clear and it can only be presumed that it was because the request did not fall within the broader scope of the Public Protector's functions, and presumably, because it was not identified as an issue for the purpose of determining the scope of the preliminary investigation.
- 7.6 The only critique that can be leveled at the manner in which the request was dealt with by the respective offices of the Public Protector, relate to the fact that the decision as well as the reasons thereof do not seem to have been recorded and communicated in writing.
- 7.7 The review went further to consider the Complainant's assertion that the conduct of the Public Protector caused him prejudice or contributed to the fact that he was reportedly unable to pursue the legal remedies at his disposal, including proceeding with the pending matter in the Labour Court.
- 7.8 From a legal perspective, this requires a factual causation inquiry to determine if the Public Protector's conduct, in a meaningful manner, contributed towards the Complainant's alleged harm, based on the prevailing factual matrix.

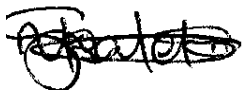
- 7.9 In determining factual causation, courts traditionally employ the well-known *conditio sine qua non* test as the point of departure for establishing a factual nexus between the impugned conduct and the claimed detriment. What the *conditio sine qua non* test involves, is to employ a process of hypothetical deduction to establish whether the offending act is a necessary condition for the harm to occur (a *conditio sine qua non*) and not merely a pre-existing antecedent. Specifically, an act will be considered to be a necessary condition if the act cannot be removed hypothetically from the prevailing factual matrix without the harm also disappearing.
- 7.10 Despite the fact that the *conditio sine qua non* test has received widespread acceptance by the courts, they have also recognized that this is not the only test to determine factual causation. An example of one such an alternative is the so-called “common-sense approach of the man in the street” – based on the notion that a factual nexus can be established in terms of human knowledge and experience by establishing whether an act is a “probable cause” of harm and not in fact a necessary condition.
- 7.11 In both tests, factual causation essentially determined by applying the “but-for test”. This test asks whether, if it was not for impugned conduct, the harm would not have occurred.
- 7.12 Applying these tests to the factual matrix at hand, the question is simply if one can categorically state if it was not for the manner in which the Public Protector apparently dealt with the complainant’s request to provide him with a copy of Treasury Circular 3 of 2008, he would not have experienced challenges to pursue his matter in the Labour Court.
- 7.13 Given the circumstances, the PPSA would contest any claim that its actions are responsible for the Complainant's distress. Beyond the fact that it was not the PPSA's responsibility to furnish the requested circular, the Complainant had several options available to pursue his request for the document, including

assistance from his legal representatives. Additionally, the document was accessible through various public digital and electronic platforms.

7.14 The ground for the review is therefore not substantiated and the original decision to close the matter is therefore confirmed.

8. CONCLUSION

8.1 The Public Protector considers this matter as finalised and cannot take it further.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE:30 SEPTEMBER 2024

Assisted by Adv D Barnard

Executive Manager: PII Coastal